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A PROPOSAL FOR SENTENCE REFORM IN FLORIDA

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Sentence disparity and sentencing procedures are currently receiving critical scrutiny from academicians, the news media, state legislatures, and also the judiciary. The increasing crime rate indicates that current sentencing practices are unsuccessful in reducing criminal activity. The visibility of the judicial sentencing process has focused most of the criticism of sentencing procedures upon the judiciary.¹

Alleged sentence disparity is one of several policy areas identified by the Florida Supreme Court's Judicial Planning Committee as requiring immediate attention. In response to the Judicial Planning Committee's interest in sentence disparity, the court established a Sentencing Study Committee to examine the state's current sentencing practices.² The primary objectives of the Sentencing Study Committee (the Committee) were to examine the extent and causes of sentence disparity and to explore the vari-

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1. See generally THE AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971); COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES (1976); D. FOGEL, "... WE ARE THE LIVING PROOF . . ." THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1975) [hereinafter cited as TASK FORCE]; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT (1975); and Bagley, *Why Illinois Adopted Determinate Sentencing*, 6 JUDICATURE 390 (1979).

2. The Sentencing Study Committee, created in January, 1978, now consists of two Justices of the Florida Supreme Court, one appellate court judge, six circuit court judges, two county court judges, five members of the Florida Legislature (two senators and three representatives), the Attorney General, one public defender, one state attorney, one private attorney and a law school professor. Other topics to be addressed by the Committee include the impact of plea bargaining on the sentencing process and the use of presentence investigation reports as an aid to sentencing.

ety of sentencing alternatives available—judicial, legislative, and administrative—to reduce unreasonable sentence variation.

During the first year of its study, the Committee primarily reviewed felony sentencing practices. In April, 1978 the Committee presented its preliminary findings to the Chief Justice of the Florida Supreme Court.³ This article presents the Committee's recommendations for the development and implementation of sentencing policy along with the rationale underlying those recommendations. In addition, this article will discuss the institutional problems encountered in attempts to change sentencing structure or policy.

I. THE SENTENCING REFORM MOVEMENT

Most contemporary sentence reform movements are initiated and executed primarily by legislative bodies reacting to public dissatisfaction with increasing crime rates. They have as a basic goal the elimination of sentence disparity by controlling the discretion exercised by trial judges in the sentencing process. Usually, the reform movements are founded on one dominant philosophy of the purpose of sentencing to the exclusion of all others. As a result, contemporary sentence reform movements tend to embrace one particular approach to structural reform of the sentencing process—again to the exclusion of all others.⁴

Although the state legislature is perhaps the most visible source of sentencing policy, a number of other organizations and individuals play key roles in policy definition and implementation. These include law enforcement agencies, state attorneys and public defenders, all levels of the judiciary, probation staff, prison personnel, and parole authorities. The interdependence of these offices gives each one an integral role in the sentencing process. Therefore, the involvement of all participants is required in order to de-

3. Interim Report of the Sentencing Study Committee to the Florida Supreme Court (1978) (on file with the Office of the State Courts Administrator at the Florida Supreme Court) [hereinafter cited as Interim Report].

4. See R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 215-21 (1969). References to sentencing "structure" or "policy" refer to any constitutional, statutory or procedural dictates or practices which affect the manner in which sentence determinations are made in a particular state or local jurisdiction. These may include formal policies such as: (1) the classification and codification of crimes and criminal sanctions, whether indeterminate or definite; (2) the adoption of objective parole criteria by parole authorities; (3) the establishment of procedures for sentence review; and (4) the use of sentencing councils to assist the trial judge; or informal policies such as (1) the priorities which govern plea or sentence negotiations, and (2) criteria applied by correctional authorities in awarding gain time.

velop a comprehensive and acceptable reform program. The Committee has taken advantage of the collective expertise of the parties noted above, hoping thereby to encourage a holistic approach to sentence reform in Florida.

In addition to the task of giving recognition to the roles of the participants in the sentencing process, any assessment of reform is further complicated by the value-based nature of sentencing decisions. To begin with, the perception of a sentence as "disparate" will be governed largely by the perceived purpose of the sentence. A sentence which is reasonably calculated to effect rehabilitation may be unreasonable if retribution is the primary purpose. Correspondingly, the goals of incapacitation or deterrence may require yet another sanction.⁵ Unfortunately, the contribution that sentencing reform may make to the accomplishment or frustration of any of these purposes is difficult to forecast with certainty,⁶ particularly since criminal sanctions can and do serve overlapping needs.⁷

The debate over the relative merits of the various purposes of sentencing has resulted in a lack of consensus about reform strategy. Lack of consensus has in turn resulted in uneven attempts at implementaton of reforms within jurisdictions. In order to foster consistency, predictability and uniform implementation, the Committee did not attempt to promote one philosophy of criminal punishment over any other.⁸ Instead, the Committee's fundamental goal has been to devise a system in which individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes, regardless of the differing penal philosophies of legislators, correctional authorities, parole authorities, or judges.⁹

5. The rehabilitation concept stems from a belief that society has shaped the offender's behavior beyond his control. Since most offenders will eventually re-enter society, they should be sentenced to ensure rehabilitative opportunities. The retribution model is based on the view that man is responsible for his actions and for his behavior and, therefore, should receive punishment proportionate to the wrong which he has inflicted upon society. The incapacitation theory is based on the concept of preventive restraint or detention, while deterrent sentences are imposed as a general means of threatening or educating potential offenders to refrain from criminal violations or as a means of dissuading a specific individual offender from returning to crime. COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES 11 (1976).

6. See J. HOGARTH, SENTENCING AS A HUMAN PROCESS 4-5 (1971).

7. Bagley, *supra* note 1, at 392.

8. Interim Report, *supra* note 3, at 3.

9. For a brief discussion of the problem of disparate sentencing, see Kennedy, *Introduction to Hofstra Law Review Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1 (1978).

Although the perception of sentence disparity partially arises out of philosophical differences, the majority of the criticism regarding sentencing practices has focused upon judicial discretion.¹⁰ No reform movement can be expected to succeed if it is based solely on the assumption that the limitation of judicial discretion will automatically result in less sentence disparity.¹¹ Sentencing reform aimed at the judicial function merely shifts discretion from one of the many participants in the sentencing process to another.¹² Therefore, the impact of any sentencing reform program must be thoroughly assessed in terms of the shift of discretion. Concern regarding the exercise of discretion is stimulated by instances of perceived capriciousness. Accordingly, the criteria which govern the exercise of discretion by judges, prosecutors and parole boards must all be made more explicit. This will allow reformers to develop a system to control or guide discretion without eliminating it altogether.

A number of schemes have been developed for classifying alternative sentencing structures. One scheme classifies sentencing structures as legislative, administrative, or judicial in nature, depending on the *locus* of primary discretion.¹³ Another labels sen-

10. See sources cited *supra*, note 1.

11. Law enforcement agencies exercise discretion at the initial point of contact with the defendant by determining whether to arrest and what charges to file. The prosecutor exercises discretion in filing charges and is limited by the boundaries of internal policy, with different prosecutors emphasizing different crimes. There is also discretion in a jury's determination of guilt or innocence. The judge exercises discretion with respect to the type and length of sentence, and his decision is influenced by the information provided by the probation officer in the presentence investigation report. Correctional authorities, by classifying and placing inmates, also may affect parole decisions. The legislature oversees the entire process by setting substantive policy. See generally R. DAWSON, *supra* note 4.

12. For example, statutes which provide minimum mandatory terms of imprisonment shift some discretion from judges to prosecutors, who then are in a better bargaining position and thus control more discretion. Similarly, flat-time sentencing places initial discretion concerning time served not in the hands of parole authorities, but in the hands of the legislature. See Hoffman & DeGostin, *An Argument for Self-Imposed Explicit Judicial Sentencing Standards*, 3 J. CRIM. JUST. 195, 203 (1975). But see Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 44-45 (1978):

[T]he effect of the Illinois and Indiana sentencing schemes [good time provisions] is to delegate power to prison disciplinary committees to cut time in half or to double it in much the same way that parole boards extend or reduce time. . . . All that Indiana and Illinois have done is shift the locus of potential arbitrary power from the parole board to the prison disciplinary committee.

13. TASK FORCE, *supra* note 1, at 79-80. The use of minimum mandatory sentences precluding judicial or administrative discretion are examples of a legislative scheme. An administrative scheme is one in which wide discretion is exercised by parole authorities. A judicial scheme is one in which the courts govern not only the sentence imposed but also the actual

tencing structures as indeterminate or determinate, depending on the *extent* of the discretion.¹⁴ For example, California has adopted presumptive sentencing. This structure allows the legislature to identify specific aggravating or mitigating factors for consideration by judges when making sentencing decisions. Identification of these factors lends more structure to the judicial role in sentencing.¹⁵ Another approach which attempts to structure judicial discretion is the sentencing guidelines concept. This concept involves an attempt by the judiciary to make explicit the underlying policies governing the sentencing decision process. Both the Florida Department of Corrections and the Florida Parole and Probation Commission are currently attempting a similar approach by developing criteria for the classification of inmates and the establishment of guidelines for the purposes of making release decisions.¹⁶

The differences among the various sentencing systems are largely a matter of semantics. Each system contains elements of the others. For instance, in a so-called pure indeterminate sentencing structure the outside limits of incarceration for a particular crime may be set at a range of one to fifty years.¹⁷ Establishment

time served. *Id.*

14. Indeterminate sentencing rests on the premise that punishment should be a remedy for the moral disease of crime and that release should occur only when the cure has been effective. A determinate sentence, on the other hand, is fixed before the offender begins to serve it. *See generally* DETERMINATE SENTENCING: REFORM OR REGRESSION? PROCEEDINGS OF THE SPECIAL CONFERENCE ON DETERMINATE SENTENCING [National Institute of Law Enforcement and Criminal Justice ed. 1978] [hereinafter cited as DETERMINATE SENTENCING]; TASK FORCE, *supra* note 1.

In short, the extent to which the legislature: (1) specifies the criteria to be considered in sentencing; (2) increases the number of classifications of crime; or (3) delimits the ranges or types of sentences that the judge might impose for such classes of crimes, renders the sentencing structure more or less definite. Decision-making related to the substantive foundation of any sentencing structure may be characterized as a process of locating the point on a continuum where policymakers feel that the best interests of the state will be served, rather than a process of choosing from a number of well-defined discrete alternatives. The use of sentencing councils, the availability of sentence review, enhancements in methods of prisoner classification, or the award of "gain time" in the state correctional system, can be regarded as clarifying the definition of the sentencing structure or procedure for a particular state.

15. *See generally* Messinger & Johnson, *California's Determinate Sentence Statute, History and Issues*, in DETERMINATE SENTENCING, *supra* note 14, at 13.

16. Bureau of Planning, Research & Statistics, Florida Department of Corrections, Research Report: Development of an Inmate Classification System for the Florida Department of Corrections (Jan. 1979) (on file with the Florida Department of Corrections); Florida Parole & Probation Commission, Objective Parole Guidelines Application Manual (Dec. 1978) (on file with the Florida Parole & Probation Commission).

17. Zalman, *The Rise and Fall of the Indeterminate Sentence*, (Pt. 2), 24 WAYNE L. REV. 45, 88 (1977); TASK FORCE, *supra* note 1, at 101.

of such a range restricts the role of the judge to simply deciding whether or not to incarcerate the criminal. The final decision as to the length of sentence rests with parole authorities. Another possibility in the category of indeterminate sentences is for a judge to set an indeterminate sentence range (such as "not less than five, but not more than ten years") within the context of statutorily specified parameters.¹⁸ In this instance, discretion is shared by the judge and the parole authorities.

Florida's sentencing system may be termed a modified indeterminate sentencing structure. The legislature establishes a maximum sentence for each category of criminal offense but provides the judiciary with the discretion to sentence an offender either to a specific period of incarceration or to a minimum-maximum range within the legislatively established limits.¹⁹ Despite a few highly publicized cases and statistics reflecting an increase in crime rates,²⁰ little consensus exists regarding the efficacy of Florida's current sentencing structure, and even less exists as to which of its component parts is in greatest need of reform.²¹ The extent to which the adoption of sentence reform proposals will alleviate unwarranted sentence variation is speculative at present. The data currently available to evaluate sentence disparity in Florida lack both uniformity and consistency.²² This inadequacy creates problems in the examination of past sentencing practices. Statistically standardized evaluation capability should be established in order to gather a quantitative and longitudinal data base. A properly assembled data base could be used to assess the potential impact of sentencing policy issues on all the components of the sentencing system. Sentencing reform cannot be viewed simply as a question of determinate sentencing versus indeterminate sentencing or judicial discretion versus the discretion of other participants; rather, sentencing reform must be regarded as an effort to develop a total system in which all of the alternatives are considered.

Whether policymakers are interested in merely refining the cur-

18. *Id.*

19. See FLA. STAT. chs. 775-899 (1979).

20. See sources cited *supra*, note 1.

21. Interim Report, *supra* note 3, at 4-6; A Report on the Analysis of Sentencing Procedures in Florida's Circuit Courts, Staff Report to the Sentencing Study Committee (1980) (on file with the Office of the State Courts Administrator at the Florida Supreme Court) [hereinafter cited as Staff Report].

22. Staff Report, *supra* note 21.

rent sentencing structure or in exploring additional changes, a review of past attempts at sentencing reform shows that the reform process should be characterized as follows.

1. All of the agencies associated with the sentencing process should have a voice in all policy-making or operational decisions in order to ensure some level of continuity.
2. Changes must be approached cautiously over a minimum period of two to three years. This period of time is necessary because of the complexity of the sentencing problem and the need to gather and analyze base line data regarding the adequacy of the current sentencing structure.
3. The design should avoid reliance upon any particular sentencing philosophy as the single foundation for reform and concentrate instead on the need for consistency and predictability in sentencing systems.
4. The stated norms must be predicated on a thorough understanding of the manner in which discretion will be allocated. If discretion is to be shifted, the implications of such shifts must be evaluated in terms of types of sentences and actual time served by those imprisoned.
5. The system must embody a determined effort to make more explicit the internal policies, criteria, or rules which govern the exercise of discretion by each of the participants in the sentencing process.
6. The design should be based on a serious consideration of all the major alternatives for structural change, with the aim of striking a balance between executive, judicial, and legislative controls. Less sweeping refinements to the sentencing process must also be considered. These include the use of judicial sentencing councils, improvement of presentence investigation reports, procedural improvement of the plea negotiation process, and establishment of methods for sentence review.
7. A capacity to adapt and change must be built in, based on a capability to gather quantitative data regarding Florida's sentencing process. This base line data will provide for identification of problems in the existing system and for monitoring and evaluating the effects of changes implemented by sentencing reform.²³

The Committee completed its review of the current sentencing structure with these principles in mind. Implementation of its pol-

23. *Id.*

icy recommendations will be a significant and positive step toward improving the sentencing process. The immediate problem confronted by the Committee was the identification of the factors applied in the exercise of judicial discretion. The task was to make these factors more explicit.

II. RECOMMENDATIONS

In its report to the supreme court, the Committee endorsed, "in principle, the exercise of judicial discretion in the sentencing process. However, in order to achieve a greater degree of consistency and fairness in the sentencing process throughout the state, the committee recommend[ed] the development and implementation of structured sentencing guidelines in combination with a sentence review panel."²⁴

The guidelines concept is based on federal parole guidelines developed for the United States Board of Parole (now the United States Parole Commission).²⁵ The federal guidelines were established to assist the hearing examiner and the Parole Commission in achieving equity in parole decisions. Within the federal guidelines a "range (in months) is provided for each combination of seriousness and risk within which hearing examiners must usually set the length of incarceration. Departures from these limits are permitted, if written reasons are given. Such departures are [then] reviewed, by panels or by the full Commission, for both individual [merit] and for policy implications."²⁶

The Parole Commission had "initially declared that it had no overall official policy, but rather that each case was decided on its individual merits."²⁷ After reviewing a number of past parole decisions, however, the parole research staff discovered that "release

24. Interim Report, *supra* note 3, at 7. The guidelines format recommended by the Committee consists of a "series of two-dimensional grids relating specific offense and offender characteristics to length of sentence. Guideline sentences are computed by assigning weights, based upon a statistical analysis of past sentencing decisions," to selected offense and offender-related characteristics. The recommended length and type of sentence is found by plotting the intersection of the "Offense Score (seriousness of the offense)," located along one axis of the grid, and the "Offender Score (prior record and social stability dimension)," located on the other grid axis. *Id.*

25. See L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN, & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 5 (1978) (supported by a grant from the National Institute of Law Enforcement and Criminal Justice) [hereinafter cited as L. WILKINS].

26. D. GOTTFREDSON, C. COSGROVE, L. WILKINS, J. WALLERSTEIN & C. RAUH, CLASSIFICATION FOR PAROLE DECISION POLICY, xxvii (1978).

27. See L. WILKINS, *supra* note 25, at 5.

decisions . . . fell into recognizable patterns.”²⁸ Three factors were isolated as crucial in the Commission’s decisions: “(1) the seriousness of the criminal behavior involved in the offense, (2) the probability of recidivism, and (3) the institutional behavior of the individual.”²⁹

The basic assumption underlying the entire guidelines concept is that “while judges in a particular jurisdiction are making sentencing decisions on a case-by-case or individual level, they are simultaneously and as a byproduct making decisions on the policy level.”³⁰ Accordingly, the first step in the development of sentencing guidelines must be to gather the empirical data necessary to describe the implicit sentencing policy operating within the jurisdiction.³¹

In order to develop an equation capable of “predicting” sentencing decisions within a jurisdiction, it is essential to identify not only the offense and offender-related characteristics exerting the greatest influences on sentencing decisions, but also the relative importance assigned to each characteristic by the trial judge. This identification is facilitated by the fact that “[w]hile judges believe they are sentencing on the basis of innumerable intangible subjective factors, most . . . sentences can be explained and predicted on the basis of [a limited number of] factors.”³²

28. Zalman, *The Rise and Fall of the Indeterminate Sentence*, (Pt. 3) 24 WAYNE L. REV. 857, 866 (1978).

29. L. WILKINS, *supra* note 25, at 5. “Since the third dimension [institutional behavior] appeared to carry much less weight in the Commission’s decisions when compared to the other two dimensions, it was later deleted from consideration in the construction of the parole guidelines.” *Id.*

30. L. WILKINS, *supra* note 25, at 10.

31. In order to determine the feasibility of developing sentencing guidelines within the state, the Committee undertook an extensive survey of 20 counties representing each of the state’s 20 judicial circuits. The purpose of the data collection effort was to identify the amount and variety of sentencing data available throughout the state. The necessary data variables are believed to be generally available given sufficient time to plan for the data collection. For a detailed report of the findings of the data collection effort, see Staff Report, *supra* note 21.

32. Singer, *In Favor of “Presumptive Sentences” Set by a Sentencing Commission*, 24 CRIME & DELINQUENCY 401, 418 (1978). As many as 205 variables have been identified that may affect a sentencing decision. Examples of these variables are: the perceived severity of the offense; the number and type of the defendant’s prior convictions; whether or not a weapon is used in the commission of the offense; the criminal status of the offender at the time of the offense; the extent of physical injury suffered by the victim; and the defendant’s prior correctional history. Other variables affecting either the initial sentence or the time actually served include the availability of sentencing alternatives other than incarceration, whether a recommended sentence was offered pursuant to a negotiated plea, and the offender’s institutional behavior. L. WILKINS, *supra* note 25, at 10-14.

Statistical analysis of these factors and the resulting sentencing equations represent the initial step in guideline development. The equations are merely a mathematical description of the current sentencing process and, as such, are not intended to be used as a prescription for future judicial sentencing. Current sentencing practices may not be desirable or philosophically justifiable but their identification must precede their amendment or refinement.³³

The format of the guidelines is contingent upon the structural model of the penal code, and of the offense and offender characteristics of greatest importance in the sentencing decision.³⁴ A popular format adopted by guidelines researchers is a two-dimensional grid relating offense severity and offender characteristic scores to specific, narrowly defined, recommended sentences within legislative parameters.³⁵

33. Hoffman & DeGostin, *supra* note 12, at 203.

34. At least four ways exist of modeling the state's criminal code and the legislatively prescribed criminal sanctions:

- [1] *unitary models* that develop one grid for all of the specific types of criminal offenses;
- [2] *statutory models* that develop specific grids to conform with various statutory classifications of crime; this could be as simple as a misdemeanor/felony dichotomy or as detailed as the statutory classifications of a criminal code (e.g., Felony One, Felony Two, etc.);
- [3] *generic models* that develop specific grids to conform with various offense types (e.g., property, violent, and drugs); and
- [4] *crime-specific models* that develop grids for each crime (e.g., burglary, robbery, etc.).

NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT & ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, MULTIJURISDICTIONAL SENTENCING GUIDELINES PROGRAM TEST DESIGN 23 (1978) (emphasis in original) [hereinafter cited as PROGRAM TEST DESIGN].

The feasibility of developing each model and its subsequent ability to predict current sentencing patterns is largely dependent upon the availability and consistency of individual data elements in the jurisdictions for which the guidelines are constructed.

35.

Offense Score	4	4-6 yrs.	5-7 yrs.	6-8 yrs.	7-9 yrs.	8-10 yrs.	8-10 yrs.
	3	OUT	OUT*	3-5 yrs.	4-6 yrs.	5- 7 yrs.	6- 8 yrs.
	2	OUT	OUT	OUT*	2-4 yrs.	3- 5 yrs.	4- 6 yrs.
	1	OUT	OUT	OUT*	OUT*	1- 3 yrs.	2- 4 yrs.
		0-1	2-3	4-5	6-7	8-9	10-11.
		Offender Score					

*The offender is a potential candidate for an alternative sentence.

Use of sentencing guidelines by trial judges would be mandatory to the extent that the sentencing norm for a particular type of defendant, convicted of a particular offense, would be consulted to decide the sentence to be imposed. Since the purpose of guidelines, however, is to lend some structure to the sentencing decision while retaining judicial discretion the trial judges may at times impose sentences other than those recommended by the guidelines.³⁶ The expectation is that approximately eighty to eighty-five percent of sentencing decisions can be accommodated by the guidelines.³⁷ The remaining fifteen to twenty percent of cases would produce sentences which fall outside of the recommended range. A reformed sentencing procedure would require that all such sentences be accompanied by written explanations for the deviation from the guidelines. These sentences then would be subject to review, upon appeal, by sentence review panels.³⁸

By limiting the written explanation requirement to sentences falling outside of the guidelines, attention is focused

on the exceptions . . . rather than on the run-of-the-mill decisions. If judges were required to give a written explanation of every sentence, the odds are high that the explanations would be routine and *pro forma*. . . . But if only the exceptions are reviewed or explained, there is a reasonable chance that the explanations and reviews will be made with some care and thought.³⁹

Written explanations will hopefully provide a basis for meaningful review; they will also facilitate collection of the information required for the periodic re-evaluation of the sentencing guidelines.⁴⁰

The proposed Florida guidelines follow the federal guidelines concept. Within the reformed structure the judge may either impose the recommended sentence or, if warranted by the nature of the offense and the offender characteristics, impose a sentence

PROGRAM TEST DESIGN, *supra* note 34, at 3. The values within the cells of the decision matrix are unique to each jurisdiction and reflect the relationship between the legislatively prescribed penal sanctions, the structure of the state's criminal code and the historic sentencing practices of the judiciary for which the guidelines were developed. The guidelines therefore are not automatically transferrable from one jurisdiction within the state to another. See Zalman, *supra* note 28, at 869-70.

36. Interim Report, *supra* note 3, at 8.

37. L. WILKINS, *supra* note 25, at 24-25.

38. Interim Report, *supra* note 3, at 8.

39. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 299 (1978) (emphasis in original).

40. Hoffman & DeGostin, *supra* note 12, at 199.

outside of the recommended range. If the latter course is chosen, the decision must be accompanied by a written statement delineating the reasons for the court's decision.⁴¹

III. THE SENTENCING COMMISSION

The Committee's proposal relegates responsibility for the implementation of sentencing guidelines to the judiciary rather than the legislature. This relegation is based on the committee's perception that the establishment of guidelines is a matter of procedural rather than substantive law and, as such, is under the purview of the judiciary.⁴²

The Florida statutes identify specific categories of criminal behavior and establish sanctions for each category.⁴³ The interpretation of legislative intent and the evaluation of individual sentences have historically been a function of the judiciary. The promulgation of sentencing guidelines is only a formal articulation of the implicit sentencing policy of the judiciary. Since the sanctions recommended by the guidelines fall within the broad sentence parameters prescribed by the legislature, sentencing guidelines do not encroach upon the traditional function of the legislature to define criminal activity and to establish maximum terms of incarceration.

Under the Committee's recommendations, the Florida Supreme Court would be responsible for the statewide implementation of the guidelines while responsibility for the actual development of the guidelines would rest with a fifteen-member sentencing commission.⁴⁴

41. Interim Report, *supra* note 3, at 8.

42. See generally Interim Report, *supra* note 3, at 8. FLA. CONST. art. V, § 2(a) provides:

The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

43. See FLA. STAT. chs. 775-899 (1979).

44. The sentencing commission would be appointed in the following manner: one member of the Senate to be appointed by the President of the Senate; one member of the House of Representatives to be appointed by the Speaker of the House; one Supreme Court Justice to be appointed by the Chief Justice of the Supreme Court; four circuit court judges and one county court judge to be appointed by the Chief Justice of the Supreme Court; one state attorney, one public defender, one private attorney (preferably with a background as defense counsel), and one representative of the Attorney General's office to be jointly appointed by the President of the Senate and the Speaker of the House upon recommendations

The role of the sentencing commission vis-a-vis the legislature and the judiciary must be clearly defined prior to the development of the guidelines. Although it is recognized that the commission must operate under the auspices of the judiciary, it should be granted sufficient autonomy to insure objective evaluation of the current sentencing patterns in an atmosphere divorced from the daily pressures of the court and the legislative process.⁴⁵ This need for autonomy is particularly important in view of the court's review of the guidelines prior to their adoption by the judiciary.

The data presented to the sentencing commission by its research staff will identify the offense and offender characteristics which have historically influenced the sentencing decision, as well as the relative weight assigned each variable by the sentencing judge. The sentencing commission will evaluate the data for inconsistencies in the length and type of sentences imposed for particular offenses. The commission will also assess the legitimacy and propriety of the factors appearing to have the greatest influence on the sentencing decision. After the variables that are deemed appropriate for inclusion in the guidelines have been identified, the research staff will re-examine the data and assign weights to these variables.⁴⁶ This information will form the basis for a guidelines model which will articulate sound sentencing policy, devoid of the influence of extra-legal considerations or the biases of individual judges.

Following implementation of the guidelines, the commission should meet on a regular basis (*e.g.*, every six months) to review the statements submitted by trial judges in support of their decisions to sentence outside of the recommended range. The purpose of the review is twofold. First, the review will identify regional changes in judicial attitudes toward specific criminal behavior. Second, the review will monitor the cases in which the sentence deviates from the recommended range. The information gained from the review will enable the commission continuously to re-evaluate their sentencing guidelines.⁴⁷

Although the criteria used to develop the guidelines must be continuously scrutinized, the interrelationship among the sentence

of the presidents of the respective statewide associations, the Florida Bar and the Attorney General; and three lay persons to be appointed by the Governor.

The staff required for all necessary data collection, analysis and research would be provided by the Office of the State Courts Administrator. Interim Report, *supra* note 3, at 8-9.

45. Singer, *supra* note 32, at 419.

46. Interim Report, *supra* note 3, at 9.

47. *Id.*

ranges assigned to each offender characteristic score requires that any changes in the guidelines must focus on the system as a whole. That is, neither the sentence ranges assigned to each offender characteristic score nor the weights assigned to the various offense and offender characteristics can be altered without an overall modification of the guidelines system.

By limiting the commission's duties to the development and maintenance of the guidelines, the commission is denied the authority to question the sentencing policies established by the legislature or to dictate how such policies should be interpreted and applied by the judiciary. These functions are an integral part of the legislative and judicial processes and therefore, cannot be assumed by an appointed body such as the commission.

IV. THE SENTENCE REVIEW PANEL

Although sentencing guidelines show considerable promise for reducing unwarranted sentence variation, their impact on the sentencing process would be substantially reduced unless a mechanism is provided to review sentences imposed outside the guidelines. Therefore, the Committee recommends that the supreme court establish a sentence review panel for the purpose of evaluating the propriety of the sentences which fall outside the suggested range.⁴⁸

The review process requires that a panel of three circuit judges and one supernumerary judge be appointed for staggered terms of six months each.⁴⁹ The panel would have jurisdiction to review those sentences which are not within the range prescribed by the sentencing guidelines and to adjust the deviant sentences when appropriate. Panel opinions which adjust sentences will be published

48. *Id.* The review panel would have appellate jurisdiction for sentence adjustment in all felony cases in which the sentence falls outside of the range prescribed by the guidelines, except for cases in which (a) the sentence was imposed pursuant to an agreement as to that sentence, or (b) the right to sentence review has been waived. *Id.* at 21.

The review panel would consist of three circuit court judges, each representing a different geographic section of the state (the areas to be determined by the boundaries of the district courts of appeal), to be appointed on a rotating basis by the chief judges of the circuit courts comprising the district. A fourth judge will also be appointed to serve as a supernumerary in the event of the inability of one of the panel members to serve. Judges so appointed will serve staggered terms of six months and would continue to serve until their successors are appointed. No judge appointed to the panel would participate in the review of a sentence imposed within his circuit. At the conclusion of each term, the supernumerary judge would become a member of the acting panel. *Id.*

49. *Id.* at 9.

as written decisions to form the basis for a "common law of sentencing."⁵⁰

The procedures governing sentence review would be promulgated by supreme court rule. The review panel would have the authority to reduce or increase the sentence to the same extent as was originally permissible for the trial court at the time the sentence was imposed.⁵¹

Application for review by the panel would have to be made within sixty days after imposition of sentence, or within sixty days after receipt by the trial court of a mandate issued by an appellate court affirming the judgment and sentence. Both the state and the defendant would be eligible to apply for sentence review, but sentence review would be delayed pending completion of all other appellate review.⁵²

All proceedings before the review panel should be in writing. The trial court, the prosecutor, and the defendant would all be eligible to submit written argument. The personal appearance of any party would occur only if the panel decides to increase a sentence. If the sentence is to be increased, the defendant would be required to appear for imposition of sentence. At that time, the defendant would also be advised of his right to be heard. In every instance in which a sentence is changed, the panel would enter a written opinion, which should be published to establish a "common law of sentencing." The Committee believes that there must be a certainty and an end to all litigation, and therefore the decision of the review panel should be final. No further review is to be available.⁵³

The Committee deliberately established a sentence review panel in lieu of placing the responsibility for sentence review with the appellate courts. Given the large case load of the appellate courts, the utilization of existing circuit court judges to form an independent sentence review panel offers the best solution for a speedy and effective review process.⁵⁴ Inherent in the review panel proposal is the concept of peer review. Trial judges actually sitting on the criminal bench, and therefore directly involved in the felony sentencing process, would review the sentencing decisions of their colleagues. These judges would gain a broad perspective on sentencing practices across the state. The discussion among the panel

50. *Id.*

51. *Id.* at 22.

52. *Id.* at 21.

53. *Id.* at 22.

54. *Id.* at 9.

members during the review process would not only encourage a critical evaluation of the case at hand, but also would encourage the panel member to evaluate his own practices. The publication of the arguments sustained, as well as those rejected, would be an additional aid in the sentencing process. The arguments would represent a persuasive form of precedent established for trial court judges by trial court judges.

Since it is argued that a considerable number of cases currently appealed are "by necessity couched in terms of objections to the process by which the conviction was obtained, [when] in fact [relief is] sought because of dissatisfaction with length of sentence," the new provision of a mechanism for direct sentence review may be expected to decrease the appellate case load.⁵⁵ If this occurs, both the supreme court and the legislature may deem it appropriate to reconsider the review panel structure and to transfer the review process to the appellate courts.

Sentence review panels are currently operating on a statewide basis in a number of jurisdictions.⁵⁶ The uniqueness of the approach recommended by the Committee lies in establishing such a review process in combination with structured sentencing guidelines. Within this coalition lies the strength of the Committee's recommendations. Under most current review procedures the decision of one judge, or a panel of three judges, is substituted for the decision of the original trial court. The ultimate goal of the Committee is to present a series of recommendations to the supreme court which will assure consistency and equity in the sentencing process. Limiting sentence reform to sentence review will fall short of this objective. Without some form of "sentencing standards, it is virtually impossible for consistent scales of punishment to emerge."⁵⁷

The sentencing guidelines proposed by the Committee will not only provide the trial judge with a standard of comparison for similar offenders; it will also provide the review panel with an overall standard by which to evaluate sentencing decisions. It should be

55. Richey, *Appellate Review of Sentencing: Recommendation for a Hybrid Approach*, 7 HOFSTRA L. REV. 71, 77 (1978).

56. See CONN. GEN. STAT. §§ 51-194 to 196 (1978); GA. CODE § 27-2511.1 (1978); ME. REV. STAT. tit. 15, §§ 2141-44 (Supp. 1979); MD. ANN. CODE ART. 27, §§ 645JA-JG (SUPP. 1979); MASS. GEN. LAWS ANN. ch. 278, §§ 28A-28C (West 1972); MONT. REV. CODES ANN. § 95-2501 to 2530 (Supp. 1977). See also *State v. Streeter*, 308 A.2d 535 (N.H. 1973).

57. Tyler, *Sentencing Guidelines: Control of Discretion in Federal Sentencing*, 7 HOFSTRA L. REV. 11, 19 (1978) (citing Newman, *A Better Way to Sentence Criminals*, 63 A.B.A.J. 1562, 1564 (1977)).

noted that the implementation of sentencing guidelines *without* provisions for sentence review would all but negate the purpose of guidelines development. Sentencing guidelines are not intended to address all cases brought before the bench. It is virtually impossible to develop a system of guidelines that would take into account the myriad aggravating or mitigating factors that could appropriately be considered. Judicial discretion is indispensable for cases where the need exists to sentence outside of the recommended range. Although the trial judge would be required to articulate his reasons for sentencing outside the guidelines, this requirement alone will not suffice to meet the Committee's goals. Without some mechanism for review, articulation of the judge's reasons would become a mere formality and the efficacy of the guidelines would be considerably diminished.

The Committee's decision to recommend access to appeal for both the prosecution and the defense was not made without considerable debate. The controversy surrounding this issue has not been completely resolved. Therefore, the Committee intends to review the access to appeal issue prior to filing its final report with the supreme court.⁵⁸

The decision to extend the privilege of an appeal to both the State and the defendant is based upon the assumption that leniency in the imposition of sentences contributes as much to sentence disparity as do excessively harsh sentences. Appeals brought by the defense will almost certainly be limited to sentences which exceed the guideline recommendations. Limiting the review process to these cases would restrict the precedential value of the panel's decisions to one end of the sentencing spectrum.⁵⁹

Although serious questions of due process and double jeopardy are raised by permitting the review panel to increase a sentence, a number of state schemes allowing for the increase of sentences have been upheld as constitutional by federal courts.⁶⁰ The ability

58. Interim Report, *supra* note 3, at 22.

59. *Id.* at 9.

60. See, e.g., *Robinson v. Warden*, 455 F.2d 1172 (4th Cir. 1972); *Walsh v. Picard*, 328 F. Supp. 427 (D. Mass.), *aff'd*, 446 F.2d 1209 (1st Cir. 1971). On the other hand, in the government's first attempt to use 18 U.S.C. § 3576 (1970), which allows the government to appeal a sentence under 18 U.S.C. § 3575 (1970) (the Dangerous Special Offender Statute), the United States Court of Appeals for the Second Circuit held that the statute violates the double jeopardy clause of the fifth amendment by permitting the government to review a sentence that the defendant has not appealed. *United States v. Di Francesco*, 604 F.2d 769 (2d Cir. 1979). In his majority opinion, Judge Smith stated: "When a defendant has once been convicted and punished for a particular crime, principles of fairness and finality re-

of the review panel to increase as well as to reduce the sentence imposed is viewed as an important element in insuring a uniform interpretation of the sentencing guidelines.

V. THE MULTIJURISDICTIONAL SENTENCING GUIDELINES PROJECT

In September of 1979, Florida was awarded a grant from the Law Enforcement Assistance Administration to develop sentencing guidelines in four of the state's twenty judicial circuits. The primary objective of the project "is to evaluate the effectiveness of sentencing guidelines as a mechanism for enhancing sentencing consistency across different jurisdictions within a state."⁶¹

Based on the results of the data collection effort undertaken in conjunction with the formulation of the Committee's recommendations, four circuits were selected for participation in the study.⁶² The selection was based on the desire to have a mixture of urban, suburban and rural felony cases, and to have a geographic distribution reflective of the varying social and political attitudes within the state.

The multijurisdictional guidelines grant will involve three distinct phases over a two-year period. The first seven months will be entirely devoted to the collection and analysis of historic case data. During the subsequent five months, a sentencing advisory board, in conjunction with the research staff, will evaluate the data and develop sentencing guidelines. In January of 1981, the guidelines will be implemented in each of the four circuits for a twelve-month period.⁶³

During the implementation phase, trial judges will be required to consult the guidelines in making sentencing decisions, and to accompany sentences which are imposed outside of the guidelines with a written explanation. These written explanations will be used by a sentencing advisory board (comparable to the sentencing commission recommended by the Committee) to determine the suitability of the sentence ranges provided by the guidelines. In this respect, the multijurisdictional project does not differ from the rec-

quire that he not be subjected to the possibility of . . . being . . . tried or sentenced for the same offense.'" *Id.* at 784 (quoting *United States v. Wilson*, 420 U.S. 332, 343 (1975)).

61. PROGRAM TEST DESIGN, *supra* note 34, at 6.

62. *Id.* at 51-53. The four circuits selected are: the fourth (Duval, Clay and Nassau Counties); the tenth (Polk, Hardee and Highlands counties); the fourteenth (Holmes, Jackson, Washington, Bay, Calhoun and Gulf counties); and the fifteenth (Palm Beach County).

63. *Id.* at 10.

ommendations of the Committee.⁶⁴

The multijurisdictional sentencing guidelines project does differ from the recommendations of the Committee in two respects. First, membership on the Sentencing Advisory Board is limited to circuit judges from the four participating jurisdictions. This limitation is necessary to conform with the program test design developed by the National Institute of Law Enforcement and Criminal Justice.⁶⁵ Second, sentence review will not be included in the study. Because of the experimental nature of the project, initiation of a sentence review process in four circuits of the state is inappropriate.⁶⁶ The project will be in operation for only a twelve-month period. At the end of that time, the entire project will be evaluated to determine the feasibility of statewide implementation.⁶⁷

The multijurisdictional sentencing guidelines project offers Florida an excellent opportunity to evaluate the guidelines concept without requiring a statewide commitment. The project will enable the supreme court to: (1) explore the possible interrelationship between sentencing guidelines and parole criteria; (2) examine the impact of guidelines on the plea bargaining process; (3) explore the possibility of including recommended ranges in probation decisions; and (4) collect data in the four jurisdictions to provide a basis for recommending improvements in presentence investigation reports, the primary source of information provided the trial judge.

VI. SUMMARY

In formulating recommendations, the Committee considered a variety of sentence reform alternatives. In addition to reviewing the state's sentencing structure, the Committee examined: (1) determinate sentencing and its variations; (2) sentencing councils; (3) sentencing guidelines; (4) formal review of sentences via the appellate review process; and (5) sentence review panels.

Each of these proposals "approaches the problem of sentence disparity from a different direction and each deals more or less successfully with a different aspect of the problem. [No] one proposal [however] is itself capable of adequately dealing with the problem"⁶⁸

64. *Id.* at 2.

65. *Id.* at 13.

66. See generally PROGRAM TEST DESIGN, *supra* note 34.

67. *Id.* at 10.

68. R. DAWSON, *supra* note 4, at 218.

The combination of sentencing guidelines and a sentence review panel proposed by the Committee narrows the range of permissible discretion by focusing the trial judge's attention on a limited number of offense and offender characteristics. The strength of the guideline system lies in the sentencing norms incorporated into the guidelines which are based on the actual experience of trial judges, rather than on any a priori notions. Barring the presence of extraordinary circumstances, the guidelines provide the trial judge with a reference point to measure the offense at hand.

Sentencing guidelines must not be interpreted as an attempt to reduce the sentencing decision to a mathematical formula devoid of the human considerations so necessary to the sentencing process. The sentencing guidelines are designed to give structure to the *judicial* sentencing process and are not a panacea for the *entire* sentencing process. Therefore, any evaluation of the sentencing guidelines must take into account their limited scope.

In developing a sound sentencing policy, it must be recognized that "[d]isparity among decisions [will remain] a problem whenever [and wherever] discretion is exercised in the administration of criminal justice,"⁶⁹ and that "discretion is indispensable in any system where some individualization is deemed necessary."⁷⁰ The most promising means of reducing disparity and ensuring a greater degree of equity in the sentencing process is not the elimination of judicial discretion, but rather, the development of methods to structure the exercise of discretion throughout the entire criminal justice system.

69. *Id.* at 215.

70. Tyler, *supra* note 57, at 19.